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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

THE BOARD OF AIRPORT COMMISSIONERS OF THE CITY OF LOS ANGELES, *et al.*,

Petitioners,

v.

JEWS FOR JESUS, INC., and ALAN HOWARD SNYDER, a.k.a. AVI SNYDER,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF AIRPORT OPERATORS COUNCIL INTERNATIONAL (AOCI) AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS, THE BOARD OF AIRPORT COMMISSIONERS OF THE CITY OF LOS ANGELES, *et al.*

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INTEREST OF THE *AMICUS CURIAE*

This brief *amicus curiae* is being filed pursuant to United States Supreme Court Rule 36 on behalf of the members of the Airport Operators Council International (AOCI). AOCI is a cooperative, non-profit association of 228 government bodies that own and

operate over 850 airports throughout the world including virtually all major domestic airports. More than 90% of the nation's domestic scheduled air passenger and cargo traffic, and virtually all of the nation's scheduled international traffic, are enplaned at AOCI member airports in the United States. AOCI provides its members with information and assistance through its conferences and literature, represents the collective interest of its members before a variety of government and air carrier industry organizations, and serves as the voice of its members to the media and the public.

AOCI is filing this *amicus* brief because of its concern that, if affirmed, the decision below holding the Central Terminal Area building of Los Angeles International Airport to be a traditional public forum would mean that all airports would be required to be available for solicitation, leafletting and other expressive activity.

This Court held in *Cornelius v. NAACP Legal Defense & Educational Fund, Inc.*, ____ U.S. ____, 105 S. Ct. 3439 (1985), *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983), and *Greer v. Spock*, 424 U.S. 828 (1976), that government property which has not traditionally served as a place for, and which does not have as a principal purpose, the expression of ideas may be preserved for the purposes for which it is intended and need not be treated as a public forum.

This brief will establish that airports, no less than the government facilities involved in the above cases, have not traditionally served as places for, and do not have as a principal purpose, the expression of ideas and therefore may be preserved for the air transportation purpose for which they were intended. Accordingly, the decision below holding that the Central Terminal Area building of Los Angeles International Airport is a traditional public forum should be reversed.

STATEMENT OF THE CASE

The Statement Of The Case contained in Petitioners' Brief is adopted by AOCI for purposes of this *Amicus Curiae* Brief.

SUMMARY OF ARGUMENT

The power of government to regulate First Amendment activity in both traditional public fora and designated public fora is severely circumscribed. Such regulations are constitutional only if they are necessary to serve a compelling government interest. However, in a non-public forum, a government's power to regulate First Amendment activity is much broader and expressive activity may be reasonably regulated in the interest of preserving the non-public forum for the purposes for which it was intended.

The Ninth Circuit erred in holding airports to be traditional public fora based on the facts that airports are generally open to the public and have large numbers of visitors. This Court has made it clear that these factors alone do not establish a traditional public forum.

Airports fall into the category of non-public fora. In recent years, this Court has made it clear that traditional public fora are only those places which have traditionally been devoted to assembly and debate, and which have as a principal purpose serving as a site for expressive activity. *Cornelius v. NAACP Legal Defense & Educational Fund, Inc.*,__ U.S.__, 105 S.Ct. 3439 (1985); *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983). Airports, like other non-public fora, neither have a long tradition of being used as sites for assembly and debate, nor have they been created to serve as sites for expressive activity. Indeed, airports have a single purpose -- facilitating safe, efficient and convenient air travel.

That single purpose causes airports to have other critical differences from traditional public fora which reflect their non-public forum status. Unlike traditional public fora, airports are not integrated into their neighboring communities but rather serve as portals to those communities. Also, airport patrons, unlike users of traditional public fora, are a captive audience to expressive activity being conducted in the areas where they must remain to serve their air travel needs. Furthermore, airports suffer from special congestion problems which do not exist in traditional public fora. Finally, airports present special security problems, not found in traditional

public fora, which necessitate security precautions taken at few other public facilities in our society.

It is also clear that classification of Los Angeles International Airport's (LAX's) Central Terminal Area building (CTA) as a designated public forum would be contrary to the decisions of this Court. A designated public forum only can be created if the relevant government authority intends to open the site to First Amendment activity by the public at large. However, LAX's explicit prohibition of First Amendment activities at the CTA precludes any inference of such intent. Moreover, even if First Amendment activity is permitted at any particular airport, that, in and of itself, would not support a conclusion that the airport's proprietor intended to create a designated public forum, since any such permission would have been granted in response to erroneous circuit court precedent.

Finally, LAX's prohibition against distributing literature on the CTA concourse floor fully satisfies the First Amendment requirements for the regulation of expressive activity in a non-public forum. The regulation is viewpoint-neutral and is reasonably related to preserving LAX for the purpose for which it was intended – facilitating air transportation.

ARGUMENT

POINT I

AIRPORTS ARE NOT TRADITIONAL PUBLIC FORA BY REASON OF THEIR HISTORY, PURPOSE AND CHARACTER

Three years ago, in *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983), this Court set forth a comprehensive analytical model for determining whether, and to what degree, a government is required by the First Amendment to permit expressive activity in a publicly-owned facility. That model properly differentiated between a traditional public forum, a designated public forum, and a non-public forum which is created for purposes other than expressive activity on the part of the public at large.

Under the *Perry* model, which was applied by this Court most recently in *Cornelius v. NAACP Legal Defense & Educational Fund, Inc.*, ___ U.S. ___ , 105 S.Ct. 3439 (1985), a government may not constitutionally prohibit First Amendment activity from a traditional public forum or a designated public forum unless the prohibition is necessary to serve a compelling government interest.[1] In sharp contrast, in a non-public forum reasonable regulations that preserve the forum for its "intended purposes" are fully constitutional, as long as there is no viewpoint discrimination. *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S., at 46.

In the instant case, the Ninth Circuit erroneously held that airports are traditional public fora because it mistakenly based public forum status on the fact that airports are generally open to the public and the fact that large numbers of people are frequently on the premises.[2] This Court, however, has made it clear in numerous

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[1] In a traditional public forum, only time, place and manner regulations narrowly tailored to serve a significant government interest may be enforced. Moreover, such regulations must leave open ample alternative channels of communication. *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S., at 45.

[2] For example, *Kuszynski v. City of Oakland*, 479 F.2d 1130 (9th Cir. 1973), held that Oakland's airport was a public forum merely because it was public property, *id.*, at 1131, using "public" to refer to government ownership or unrestricted access. Similarly, in *U.S. Southwest Africa/Namibia Trade & Cultural Council v. United States*, 708 F.2d 760 (D.C. Cir. 1983), *Fernandes v. Limmer*, 663 F.2d 619 (5th Cir. 1981), *cert. dismissed*, 458 U.S. 1124 (1982), and *Chicago Area Military Project v. City of Chicago*, 508 F.2d 921 (7th Cir. 1975), *cert. denied*, 421 U.S. 992 (1975), the respective circuits held that the airports in question were public fora because the public had unrestricted access to the airports and because large numbers of people used the airports. *See, U.S. Southwest Africa/Namibia Trade & Cultural Council v. United States*, 708 F.2d, at 764; *Fernandes v. Limmer*, 663 F.2d, at 607; *Chicago Area Military Project v. City of Chicago*, 508 F.2d, at 925.

Other circuit court decisions holding airports to be public fora merely rely on the circuit's prior decision so holding. *See, Rosen v. Port of Portland*, 641 F.2d 1243, 1246 (9th Cir. 1981); *International Society for Krishna Consciousness, Inc. v. Rochford*, 585 F.2d 263, 267 (7th Cir. 1978).

Another circuit court decision treated an airport as a public forum without describing it as such or explaining why that classification was appropriate. *International Society for Krishna Consciousness of Atlanta v. Eaves*, 601 F.2d 809 (5th Cir. 1979).

cases that such facts do not establish public forum status. More specifically, this Court has

> " . . . expressly rejected the suggestion that 'whenever members of the public are permitted freely to visit a place owned or operated by the Government, then that place becomes a "public forum" for purposes of the First Amendment.' "

United States v. Albertini, ____ U.S. ____ , 105 S.Ct. 2897, 2905 (1985), *quoting Greer v. Spock*, 424 U.S., at 836; *see also, United States v. Grace*, 461 U.S. 171, 177 (1983).

Similarly, in *Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789 (1984), this Court rejected in equally unequivocal terms the proposition that a publicly-owned facility is a public forum because it would be a useful place for the communication of ideas:

> "Lampposts can of course be used as signposts, but the mere fact that government property can be used as a vehicle for communication does not mean that the Constitution requires such uses to be permitted. *Cf. United States Postal Service v. Greenburgh Civic Assns.*, 453 US, at 131."

Id., at 814 (footnote omitted); *see also, United States v. Albertini*, 105 S.Ct., at 2905; *Greer v. Spock*, 424 U.S., at 838 n. 10.

The basis for excluding expressive activity from government-owned property otherwise generally open to the public is, as held by this Court, that:

> "The State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated."

Adderley v. Florida, 385 U.S. 39, 47 (1966).

As held by this Court, "a principal purpose of traditional public fora is the free exchange of ideas . . . ." *Cornelius v. NAACP*

Defense & Educational Fund, Inc., 105 S.Ct., at 3448. Thus, a government-owned facility is a traditional public forum *only* if it is among "those places which 'by long tradition or by government fiat have been devoted to assembly and debate.' " *Id.*, at 3449, *quoting Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S., at 45. This description hearkens back to the often-quoted passage by Justice Roberts in *Hague v. C.I.O.*, 307 U.S. 496, 515 (1939):

> "Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens."

As the quotation from *Hague* suggests, public streets and parks are a unique species of public property. The special character of streets and parks is reflected in the fact that this Court has never specifically identified as a traditional public forum anything other than a street, sidewalk, or park.[3] *See, Cornelius v. NAACP Legal Defense & Educational Fund, Inc.*, 105 S. Ct., at 3449; *Members of the City Council v. Taxpayers for Vincent*, 466 U.S., at 792-93; *United States v. Grace*, 461 U.S., at 177; *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S., at 45.

Significantly, airports, unlike streets and parks, do not have a tradition of being used as sites for assembly and debate. Moreover, in sharp contrast to streets and parks which have the exchange

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[3] A college campus has been described as possessing "many of the characteristics of a traditional public forum" for its students. *Cornelius v. NAACP Legal Defense & Educational Fund*, 105 S.Ct., at 3450, *citing Widmar v. Vincent*, 454 U.S. 263, 267 n.5 (1981). *Widmar* described a college campus as having the characteristics of a public forum because the campus serves as a "marketplace of ideas." 454 U.S., at 267 n.5. However, the same cannot be said of an airport, the purpose of which is transportation, not discourse.

of ideas as a principal purpose, airports have only one purpose, *i.e.*, to effect the safe, efficient and convenient movement of departing and arriving passengers to and from aircraft. All airport functions and services are either directly or indirectly related to air travel.[4] *See*, R. Horonjeff & F.X. McKelvey, Planning & Design of Airports, at 325-27 (3d ed. 1983) [Lodg 3-5].[5]

The sole purpose of airports, the facilitation of air travel, is reflected in all aspects of airport operations, such as their financing, their lack of integration with neighboring communities, the creation of captive audiences, and the special congestion and security problems which are not present in traditional public fora.

Streets and parks are financed from general tax funds. In contrast, reflecting their limited purpose, airports are financed to the greatest extent possible from user fees paid by the airlines, air passengers and general aviation. In a 1985 report to Congress, the Secretary of Transportation observed that virtually all airport funding comes from airport-user sources. Department of Transportation, National Plan of Integrated Airport Systems 1984-1993, at 16 (1985) [Lodg 11].

Even the limited portion of airport capital funding provided by the Federal Government does not come from general revenues. Rather, federal aid to airports is derived from user fees collected from air passengers via an airline ticket excise tax, Internal Revenue Code of 1954, §§4261-62, as amended, 26 U.S.C. §§4261-62 (1982 & Supp. III 1985), and from transporters of property by air via an airwaybill excise tax. *Id.*, §§4271-72, 26 U.S.C. §§4271-72 (1982). These user fees are accumulated in a trust fund together with an amount of taxes equivalent to those received as excise taxes on aircraft tires and aircraft fuel, Tax Equity and

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[4] Indirect aids to air travel at airports include refreshment stands, restaurants and retail shops, which are provided for the comfort and convenience of air travelers.

[5] "Lodg" followed by numerals refers to pages in the Lodging of the *Amicus Curiae*. The Lodging, which has been deposited with the Court, contains copies of material other than statutes, regulations and judicial opinions referred to herein.

Fiscal Responsibility Act of 1982, §281(a), as amended, 26 U.S.C. §9502(b) (1982 & Supp. III 1985), plus such additional monies as are necessary to defray the expense of maintaining the federal components of the national air traffic system. *Id.*, §281(a), 26 U.S.C. §9502(c) (1982). Trust fund monies are disbursed as federal grants to airport operators for the construction of airport additions and improvements. The primary criterion guiding the distribution of federal aid is the number of passengers enplaned at each airport. Airport and Airway Improvement Act of 1982, §507, 49 U.S.C. app. §2207 (1982). Significantly, an explicit statutory requirement for the receipt of federal aid is that an airport be self-supporting to the extent possible. Airport and Airway Improvement Act of 1982, §511(a)(9), 49 U.S.C. app. §2210(a)(9) (1982).

LAX is typical of most major airports in the United States in that it is, in fact, financially self-supporting. At such airports, operating costs must be satisfied with revenues generated from travel related user fees. *See*, Joint Appendix, at 15a-16a, ¶¶44-45. As indicated by their financing, including the Federal Aid statutes, it is clear that the sole purpose of airports is the facilitation of air transportation.

An essential feature of a traditional public forum, totally absent in an airport because of its limited purpose, is that a public forum is integrated into the community. Streets and parks, "time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions", *Hague v. C.I.O.*, 307 U.S., at 515, because those sites are integral to daily life in their communities. Thus, in *Marsh v. Alabama*, 326 U.S. 501 (1946), this Court held that, notwithstanding private ownership, First Amendment activity could not be prohibited in the "business block" of a "company town", since,

> "The 'business block' serves as the community shopping center and is freely accessible and open to the people in the area and those passing through."

Id., at 508.

The importance of integration into the surrounding community to the existence of a traditional public forum is demonstrated by the

disparate treatment accorded to the two military bases involved in *Flower v. United States*, 407 U.S. 197 (1972), and *Greer v. Spock*, 424 U.S. 828 (1976). Although both bases were completely open to the public, in *Flower* this Court held that a military commander could not bar leafletting on a street in Fort Sam Houston, Texas, whereas in *Greer* this Court upheld the exclusion of leafletting from the Fort Dix Military Reservation in New Jersey. *See also, United States v. Albertini*, __ U.S. __, 105 S.Ct. 2897 (1985). Fort Dix was held by this Court to merit different treatment from that of Fort Sam Houston because the streets of Fort Sam Houston were integrated into the surrounding city of San Antonio, whereas Fort Dix was not integrated into any surrounding community, and thereby retained its character as a separate military enclave. *Greer v. Spock*, 424 U.S., at 835-36. Consequently, Fort Dix's commanding officers were held not to have "abandoned" their "claim of special interest in regulating the distribution of unauthorized leaflets . . . within the confines of the military reservation." *Id.*, at 837.

United States v. Grace, 461 U.S. 171 (1983), is also in point on this issue. There, this Court held that the statute prohibiting, among other things, distributing leaflets and displaying banners on Supreme Court grounds was unconstitutional insofar as it applied to the sidewalks on the perimeter of those grounds. Significantly, this Court observed in *Grace* that neither the public ownership of those sidewalks, nor the lack of restrictions to entry on them, required that the sidewalks be treated as a public forum. *Id.*, at 178. However, in holding that the statute was invalid with respect to the sidewalks surrounding the Supreme Court, this Court emphasized that such sidewalks were indistinguishable from other Washington, D.C. sidewalks. More specifically, this Court stated that,

> "There is no separation, no fence, and no indication whatever to persons stepping from the street to the curb and sidewalks that serve as the perimeter of the Court grounds that they have entered some special type of enclave."

Id., at 180.

Here, as in the case of Fort Dix, and unlike the facts in *Flower* and *Grace*, it is clear that airports are not integrated into the day-to-day life of surrounding communities. The singular purpose of an airport, air transportation, delimits the role it serves in relation to its neighboring communities to that of a portal to those communities. The people living near an airport do not enter it as they go about their daily life, but enter only to leave their locale or to drop off or pickup an air passenger. Therefore, airport officials, no less than the military officials at Fort Dix, have not "abandoned" their "claim of special interest in regulating the distribution of unauthorized leaflets . . . within the confines of the [airport]."

Additionally, and in sharp contrast to the traditional public fora of streets and parks, the singular purpose of airports creates captive audiences. Airports are used by the public to board and leave airplanes at scheduled departing and arrival times, or to meet and see off air passengers. Persons waiting for an airplane to arrive or depart shortly are not free to roam the airport. Rather, they must remain in a waiting area or risk missing the airplane. Thus, persons using the waiting areas constitute a captive audience for anyone expressing his or her views within their visual or aural range. Captive audiences exist not only at the enplaning and deplaning points, but also at ticket counters, security checkpoints, baggage conveyor belts, and car rental and other ground transportation counters. The public must remain at all of these locations to complete travel-related tasks.

Quite obviously, as noted by Justice Douglas with regard to the patrons of public transportation vehicles, the rights of such captive audiences "to be free from forced intrusions on their privacy" would be violated if they were forced to be the object of uninvited persuasion. *Lehman v. City of Shaker Heights*, 418 U.S. 298, 307 (1974) (Douglas, J., concurring); *cf., Consolidated Edison Company of New York, Inc. v. Public Service Comm'n*, 447 U.S. 530, 542 (1980).

The singular purpose of facilitating air transportation is also reflected in the unique pedestrian congestion problems of airports. Initially, it should be noted that at an airport, unlike the usual

situation in a street or a park, a pedestrian delay of minutes or even seconds could very well cause a loss of hours in travel time because of a missed plane. Secondly, at an airport, unlike a street or a park, there is little or no choice among alternative pedestrian routes. Those using an airport to board a departing airplane move from the airport entrance to the terminal building, and then from ticketing counter to security checkpoint to gate check-in counter to enplaning waiting area to airplane boarding ramp. *See*, W. Hart, The Airport Passenger Terminal, at 17-18 (1985) [Lodg 15-16]. Similarly, arriving passengers move from the deplaning ramp to the baggage pick-up area to ground transportation facilities. *Id.*, at 18 [Lodg 16].

It also is well-established that at major airports, pedestrian routes are heavily congested during peak travel hours. Lemer, *Airport Landside Capacity: A Growing Concern*, T.R. News, May-June 1986, at 5 [Lodg 31]. The timing and duration of peak periods are subject to considerable fluctuation. Problems of congestion often are multiplied and lengthened by delays resulting from local weather conditions, mechanical difficulties, airline "hubbing" activities, and other causes. In addition, charter flight activity and schedule changes caused by weather conditions and other factors throughout the United States and the world also cause considerable variation in the intensity of use of each airport. *See generally*, Congress, Office of Technology Assessment, Airport System Development, at 48-49 (1984) [Lodg 39-40]. Thus, airport congestion varies substantially, and in a manner that cannot be accurately predicted.

Moreover, congestion at major airports is getting worse. In the words of the Congressional Budget Office,

> "Crowding has thus emerged as the major airports' number-one problem, and the FAA anticipates a worsening of airport congestion in coming years."

Congressional Budget Office, Financing U.S. Airports in the 1980's, at xix (1984) [Lodg 48]. A senior research advisor of the Transportation Research Board has observed that "[s]ome airports are exceeding capacity almost on a daily basis." Lemer, *Airport Landside Capacity: A Growing Concern*, T.R. News, May-June

1986, at 2 [Lodg 28]. And the Federal Aviation Administration has estimated that the annual number of passengers using the nation's airports will increase more than 70% over the next decade, which will result in the nation's airports being "swamped". *Id.*, at 3.

LAX itself provides a good example of airport congestion problems. LAX handled over 33 million passengers annually in 1983, together with an estimated equal number of "meeters and greeters." Joint Appendix, at 9a, ¶10. The growth of airport use has necessitated costly expansion construction. *Id.*, at 8a, ¶¶6-7. However, anticipated growth in usage to 40 million passengers in 1986 means that this costly expansion project merely ameliorates but does not eliminate congestion. Joint Appendix, at 2a.

Finally, the sole purpose of facilitating air transportation is reflected in the heightened security concerns of airports which are not present in streets and parks. The well-known history of skyjacking and other forms of terrorism at airports has resulted in the adoption of equally well-known security precautions. The critical nature of these airport precautions, which need to be taken at few other locations in this society, is reflected in the fact that they are mandated by federal law. The Air Transportation Security Act of 1974 required the Secretary of Transportation to issue regulations for the mandatory screening of air passengers using international, interstate, and intrastate flights. Air Transportation Security Act of 1974, §202, as amended, 49 U.S.C. app. §§1356, 1357 (1982 & Supp. III 1985). The air security regulations currently in effect impose security obligations on airport operators, 14 C.F.R., Part 107 (1986), airline operators, *id.*, Part 108, and indirect air carriers such as freight forwarders. *Id.*, Part 109. These regulations address the potential dangers of terrorist bombing and air piracy. *See*, 14 C.F.R. §§107.23(b)(3), 108.19(a), 109.3(a)(1) (1986). These very real dangers both distinguish airports from traditional public fora and mandate that airport operators in carrying out their sole purpose of facilitating air transportation not be limited in prohibiting activities unrelated to air travel such as the expressive activity involved here.

The undeniable singular purpose of facilitating air transportation and the resultant distinctions between airports and traditional

public fora clearly make airports inappropriate locations for First Amendment activity. Such activity, as has been demonstrated, is clearly inconsistent with the purpose of an airport. Indeed, if the decision below, holding the Central Terminal Area building of LAX to be a public forum were affirmed, then every airport terminal building, as well as every government parking lot, courthouse, office building and all other government facilities generally open to the public would, "immediately become Hyde Parks open to every would-be pamphleteer and politician." *Lehman v. City of Shaker Heights*, 418 U.S., at 304, *quoted in United States Postal Service v. Council of Greenburgh Civic Assn's*, 453 U.S. 114, 130 n.6 (1981), *and, Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S., at 49 n.9. Fortunately, for the future safe, efficient and orderly operation of this nation's air transportation system and other essential governmental functions, such a result is not constitutionally required.

Time and time again, in such cases as *Taxpayers for Vincent, Greenburgh Civic Ass'ns, Greer,* and *Lehman*, this Court has held that First Amendment use of those fora was incompatible with those sites because such use was not consistent with their intended purposes. *See, United States Postal Service v. Council of Greenburgh Civic Assn's*, 453 U.S., at 130 n.6. Here, no less than in the above cited cases, it is clear that the use of airport terminal buildings for First Amendment activities is incompatible with those sites because such use is not consistent with their intended purpose.

In sum, the decision below is erroneous and in direct contravention of prior decisions by this Court. Accordingly, *Amicus* respectfully submits that this Court should hold that the Central Terminal Area building of LAX is not a traditional public forum.

POINT II

LOS ANGELES INTERNATIONAL AIRPORT'S CENTRAL TERMINAL AREA IS NOT A DESIGNATED PUBLIC FORUM BECAUSE IT HAS NOT BEEN OPENED FOR FIRST AMENDMENT USE BY THE PUBLIC AT LARGE

As defined by this Court, a designated public forum is a publicly-owned facility which is not a traditional public forum, but which has intentionally been opened for First Amendment activity on the part of the public at large. *Cornelius v. NAACP Legal Defense & Educational Fund, Inc.*, 105 S.Ct., at 3449; *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S., at 45.[6]

A designated public forum only can be created if the relevant government authority so intends. Therefore, a designated public forum is not created by inaction or if there is clear evidence of contrary intent. *Cornelius v. NAACP Legal Defense & Educational Fund, Inc.*, 105 S.Ct., at 3449, 3450. Furthermore, a designated public forum is not created when a government selectively opens a forum for use by certain speakers or on certain subjects. For example, in *Cornelius*, this Court held that the opening of the Combined Federal Campaign to over 200 charities did not transform that program into a designated public forum. *Id.*, at 3450-51. Similarly, in *Perry*, this Court held that the use of the school mailboxes by school officials, the recognized teachers' union and certain civic associations, did not transform the mailboxes into a designated public forum. 460 U.S., at 47. And finally, in *Greer v. Spock*, this Court held that inviting certain civilians to speak at Fort Dix did not transform it into a public forum. 424 U.S., at 836.

Application of the foregoing principles to the instant case leads to the inescapable conclusion that the concourse of Los Angeles

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[6] In general, the restrictions applicable to a traditional public forum are applicable to a designated public forum except that a government need not maintain the open character of a designated public forum indefinitely, but may change the status of a designated public forum. *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S., at 46.

International Airport's Central Terminal Area (CTA) is not a designated public forum.

Resolution No. 13787 of the Los Angeles Board of Airport Commissioners explicitly states that the CTA is to be used only for air commerce and uses incidental thereto, and that the CTA is not open for First Amendment activity. Joint Appendix, at 3a-4a. Pursuant to Resolution No. 13787 the Board of Airport Commissioners has acted consistently in denying requests to conduct First Amendment activities at the CTA. Joint Appendix, at 15a, ¶¶42-43.

In view of the Resolution's explicit limitation of the use of the CTA and the express prohibition against First Amendment activity, it is clear that the airport's governing authority has not intended to open the CTA for First Amendment activity by the public at large, thereby precluding a determination of designated public forum status.[7] *Cornelius v. NAACP Legal Defense & Educational Fund, Inc.*, 105 S. Ct., at 3449, 3450.

Furthermore, classification of the CTA as a designated public forum would be unwarranted even if the Board of Airport Commissioners had not adopted Resolution No. 13787. Airports have permitted First Amendment activity only in the face of erroneous circuit court precedent holding airports to be public fora. Quite obviously, under such circumstances, the existence of a present policy at any particular airport permitting First Amendment activity is more a reflection of existing erroneous precedent than it is a reflection of the intent of the airport proprietor to designate the airport as a public forum.

For the foregoing reasons, we submit that it is clear that the Central Terminal Area of LAX has not been designated as a public forum.

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[7] It is equally clear that the unauthorized occurrence of First Amendment activity in the CTA cannot transform that site into a designated public forum. As previously noted, inaction cannot create a public forum, especially in the face of an express policy to the contrary. *Cornelius v. NAACP Legal Defense & Educational Fund, Inc.*, 105 S. Ct., at 3449, 3450.

POINT III

PROHIBITION OF RESPONDENTS' DISTRIBUTION OF LEAFLETS AT LOS ANGELES INTERNATIONAL AIRPORT'S CENTRAL TERMINAL AREA IS A PERMISSIBLE REGULATION OF FIRST AMENDMENT ACTIVITY IN A NON-PUBLIC FORUM

It is well-established that governments may prohibit or restrict First Amendment activity in a non-public forum if the restriction is both reasonable in light of the purpose of the site in question and is not designed to suppress a particular viewpoint. *Cornelius v. NAACP Legal Defense & Educational Fund, Inc.*, 105 S.Ct., at 3448, 3451; *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S., at 49.

The prohibition of the distribution of literature by respondents on the concourse floor of the CTA fully satisfies the requirements for the permissible regulation of First Amendment activity in a non-public forum.

Initially, it should be noted that there has never been an allegation that the airport's prohibition against First Amendment activity on the concourse floor of the CTA was adopted to suppress respondents' particular viewpoint. Also, to the extent that air travel-related expressive activity is permitted at the CTA, it is permitted not on the concourse floor but only in rented display cases, counters and offices. Moreover, to the extent that travel-related expressive activity on the part of rent-paying tenants is permitted at such fixed locations and non-travel-related expressive activity by non-tenants is prohibited, such a status-based distinction is eminently reasonable and constitutional in a financially self-supporting airport.

> "Implicit in the concept of the nonpublic forum is the right to make distinctions in access on the basis of subject matter and speaker identity. These distinctions may be impermissible in a public forum but are inherent and inescapable in the process of limiting a nonpublic forum to

> activities compatible with the intended purpose of the property. The touchstone for evaluating these distinctions is whether they are reasonable in light of the purpose which the forum at issue serves."

Perry Education Ass'n v. Perry Local Educators' Ass'n, 460 U.S., at 49 (footnote omitted).

In view of the foregoing, it is evident that LAX's prohibition of respondents' distribution of literature on the concourse floor of the CTA is a permissible regulation of First Amendment activity in a non-public forum. Accordingly, AOCI respectfully submits that the decision below holding that such prohibition was violative of the First Amendment should be reversed and the complaint dismissed.

CONCLUSION

It is respectfully submitted that the foregoing establishes that the Central Terminal Area building of Los Angeles International Airport is neither a traditional public forum, nor a designated public forum, and the prohibition of respondents' distribution of literature in the Central Terminal Area is a permissible regulation of First Amendment activity in a non-public forum. Consequently, the judgment of the United States Court of Appeals for the Ninth Circuit should be reversed and instead this Court should order entry of judgment dismissing the complaint.

Respectfully submitted,

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